

Supplemental Letter of Findings Number: 05-0506
Gross Income Tax
For the Years 2001-2002

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ISSUES

I. Gross Income Tax--Interstate Commerce

Authority: IC § 6-8.1-5-1; IC § 6-8.1-9-1; [45 IAC 1.1-3-3](#)

Taxpayer protests the assessment of gross income tax on certain sales that Taxpayer maintains were made in interstate commerce

STATEMENT OF FACTS

Taxpayer is a company engaged in the sale of food and food service supplies. Taxpayer operates three sales offices, three transit and delivery stations, and thirteen retail stores in Indiana. Taxpayer has two types of operations, which will be described as grocery-type operations and restaurant-type operations. Taxpayer's grocery-type operations are ones in which customers enter Taxpayer's retail stores and purchase food and other related items for personal or group use. Taxpayer's restaurant-type operations are ones in which Taxpayer delivers items ordered by restaurants, cafeteria, and similar customers. Taxpayer excluded some restaurant-type sales made to Indiana customers from its gross income for gross income tax purposes. However, upon audit of Taxpayer, the Department concluded that the sales were connected with an Indiana business situs and assessed gross income tax.

The Department previously conducted a hearing on Taxpayer's protest. The Department denied Taxpayer's protest on the gross income tax issue discussed above and on various other issues. Taxpayer requested a rehearing, which the Department granted. Additional facts will be supplied as necessary.

I. Gross Income Tax--Interstate Commerce

DISCUSSION

Taxpayer argues that the restaurant-type sales were negotiated by out-of-state personnel and accordingly should not be subject to gross income tax. Taxpayer asserts that the sales in question were not connected to an Indiana business situs, and cites [45 IAC 1.1-3-3\(c\)\(5\)](#) for the proposition that sales not connected with Taxpayer's business situs should be exempt from gross income tax. That regulation states:

Gross income derived from the sale of tangible personal property in interstate commerce is not subject to the gross income tax if the sale is not completed in Indiana. The following examples are situations where a sale is not completed in Indiana prior to or after shipment in interstate commerce:

* * *

(5) A sale to an Indiana buyer by a nonresident with an in-state business situs or activities but the situs or activities are not significantly associated with the sale because it was initiated, negotiated, and serviced by out-of-state personnel, and the goods are shipped from out-of-state. The in-state business situs or activities will be considered significantly associated with the sale if the sale is initiated, negotiated, or serviced by in-state personnel.

Also of note is [45 IAC 1.1-3-3\(d\)\(7\)](#), which states in relevant part

Gross income derived from the sale of tangible personal property in interstate commerce is subject to the gross income tax if the sale is completed in Indiana. The following examples are situations where a sale is completed in Indiana prior to or after shipment in interstate commerce:

* * *

(7) A sale to an Indiana buyer by a nonresident seller if the sale:

- (A) originated from;
- (B) was channeled through; or
- (C) was otherwise connected with;

an Indiana business situs established by the seller.

As noted in the audit report, Taxpayer has several locations in Indiana, which gave Taxpayer an Indiana business situs. These locations include sales offices, delivery stations, and retail stores. Taxpayer provided a spreadsheet that divided its sales into five categories—two categories of sales that Taxpayer conceded were taxable and three categories that Taxpayer asserts were not taxable (the information was for the periods from August 2004 to July 2006; though the periods are not covered in this protest, the categorization of sales likely reflect those for the periods covered in this protest). Taxpayer also filed amended returns for the years in question, seeking a refund for amounts that Taxpayer now claims were erroneously included on Taxpayer's original return.

Taxpayer's information detailing sales by category results in a conclusion without underlying supporting documentation. Taxpayer's information provides a breakdown by sales category—the methods by which customers placed their sales and orders with Taxpayer, and *possibly* the location where Taxpayer received the sales and orders. However, Taxpayer's information does not provide information regarding whether Taxpayer channeled all or some portion of the sales Taxpayer claims were exempt through Taxpayer's sales offices or distribution centers—the situs for the sales that Taxpayer claimed as exempt—located in Indiana or in other jurisdictions. Because Taxpayer has not met its burden under IC § 6-8.1-5-1 regarding the situs of the sales Taxpayer claimed as exempt, Taxpayer's protest is denied.

In conjunction with the rehearing, Taxpayer also filed refund claims for the protest years. For 2001, the claim for refund was filed more than three years after the due date of the return, and therefore is not timely per IC § 6-8.1-9-1(a). For 2002, the claim for refund is denied for the reasons previously set forth in this letter of findings.

FINDING

Taxpayer's protest is denied.

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